Filed
June 5, 2006
80395-1

No. 57253-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CITY OF ARLINGTON, DWAYNE LANE and
SNOHOMISH COUNTY,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, STATE OF WASHINGTON; 1000 FRIENDS OF WASHINGTON; STILLAGUAMISH FLOOD CONTROL DISTRICT; PILCHUCK AUDUBON SOCIETY; THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT; and AGRICULTURE FOR TOMORROW,

Respondents.

REPLY BRIEF OF APPELLANT SNOHOMISH COUNTY

JANICE E. ELLIS, Snohomish County Prosecuting Attorney
JOHN R. MOFFAT, WSBA #5887, Sr. Deputy Prosecuting Attorney
Admin East 7th Floor, M/S 504
3000 Rockefeller Avenue
Everett, WA 98201-4060
(425) 388-6330
Attorney for Snohomish County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases: **Page(s)**

Growth Hearings Board Cases:

Other Cases:

Statutes:

Administrative Code:

I. INTRODUCTION

In Snohomish County's (County) Opening Brief (COB), it explained that the Central Puget Sound Growth Management Hearings Board (Board) erred below by failing to give proper deference to the County's decision to re-designate certain agricultural and rural lands (Island Crossing property) for inclusion in the City of Arlington's urban growth area (UGA). The COB specifically concentrated on an analysis of the criteria in the Washington Administrative Code for the designation of agricultural lands. A fundamental prong of that analysis, and a key issue before this Court, is that the County's legislative authority is free, under the Growth Management Act (GMA) (ch. 36.70A RCW), to evaluate those criteria and make a different planning choice at a later date in time than one it made years earlier, without having to show any "changed circumstances," as long as the record supports the new decision.

Instead of deferring to the County's decision, as it was required to do under the law, the Board continually raised the bar in deciding what the County had to do to comply with the GMA. First, it required the County to show "changed circumstances" before it could re-designate the Island Crossing property, which is not the standard of review under the GMA. Later, following the compliance hearing, it again ruled against the County, for the first time announcing a new "rule" declaring that the County had

failed to undertake an "area-wide" land analysis (rather than focusing on a site-specific study of whether the subject Island Crossing property met the GMA definition of "agricultural land"), which the Board concluded was required under the GMA before land could be re-designated out of an agricultural designation. The Board's "moving target" approach to its review of the County's actions was unlawful, and demonstrated the Board's bias to disapprove any County decision that re-designated the property.

Respondents CTED and Futurewise[1] defend the Board's action. Futurewise concentrates on rebutting the County's arguments relating to the agricultural lands. CTED primarily addresses issues relating to the standard of review and the Board's role in the GMA review process, though it addresses some details of the Board's decisions.

The County additionally argued that, on appeal below, the superior court erred in holding that (1) res judicata applies to the County's decision to re-designate the Island Crossing land, and (2) the County was required to show "changed circumstances" before re-designating the property (COB at 45-49). Respondent Stillaguamish Flood Control District (District) defends the trial court's decision on the res judicata issue.

[1] The County will refer to Respondents Futurewise, Agriculture for Tomorrow and Pilchuck Audubon Society as "Futurewise."

The County's Reply Brief will primarily address the arguments of Futurewise and the District, although it will also reply to some of CTED's points. Appellants City of Arlington and Dwayne Lane will also provide replies to these briefs. The County will make every effort not to duplicate arguments of its co-appellants.

II. ARGUMENT

A. The Board's Imposition of an Area-Wide Test for Whether Land is of Long-Term Commercial Significance is an Erroneous Interpretation of the GMA.

1. The Board Erroneously Failed to Defer to the County's Interpretation of the GMA.

Under Quadrant Corporation v. CPSGMHB, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005), the Board is required to defer to a county's planning actions, as long as they are consistent with the goals and requirements of the GMA. A court's review of a board decision under the standards in RCW 34.05.570(3) is then based on whether the board, in finding a county action clearly erroneous under RCW 36.70A.320(3), provided proper deference to the county's action. This is a new standard of review, as it differs from the pre-Quadrant standard where the reviewing court afforded deference to the Board's decision. Quadrant, 154 Wn.2d at 238.

The County pointed out that, in its Order Finding Continuing Noncompliance and Continuing Invalidity (Order on Compliance), the

Board specifically stated that it was not deferring to the County's planning actions. COB at 12, 34 [citing CP Sub #24, p. 2902 (footnote 8) ("The Board has no duty to defer to the County when interpreting the meaning of the words of the statute (GMA))"]. This failure to defer is an error of law warranting reversal under RCW 34.05.570(3)(d). CTED attempts to defend the Board's failure to defer to the County by claiming that this quoted language refers to the fact that the Board need not "defer to a clearly erroneous interpretation of the GMA." CTED Brief at 21, footnote 18. However, read in its entirety, the Board's language reflects no such limitation:

> The Board has no duty to defer to the County when interpreting the meaning of the words of the statute. The Courts have consistently recognized that statutory interpretation of the GMA is the province of the Boards, not local governments. [citing to Court of Appeals decision in Quadrant (119 Wn.App 562, 81 P.3d 918 (2003))].

CP Sub #24, p. 2902 (footnote 8) (emphasis added). It is the legal principle in the above-underlined language in the Board's Order on Compliance that the Supreme Court overruled in Quadrant. Interpretation of the GMA is no longer the province of the Board. Instead, that interpretation is the County's to make, subject to being reversed by the Board only if the County's interpretation (as demonstrated by its planning action) is clearly erroneous under RCW 36.70A.320(3). 154 Wn.2d at 236-38.

This is an important distinction, particularly within the context of the language of the Board's Order on Compliance. The above-quoted language is in a footnote to the Board's holding that whether certain land has "long-term commercial significance" (LTCS)[2] as agricultural land is not a parcel-specific inquiry, but requires an "area-wide" analysis. As the County will explain in Section 2 below, the GMA says no such thing.

2. Under The GMA, the Test for Whether Lands Are of Long-Term Commercial Significance is a Parcel-Specific Inquiry.

The Board's interpretation that the LTCS analysis is an area-wide inquiry is based on a misreading of the GMA. The County's interpretation of the GMA that whether particular land has LTCS as agricultural land is a parcel-specific inquiry was not clearly erroneous, and was in fact consistent with Redmond I.[3] The County's only "error" was that its interpretation of the GMA was different from the Board's interpretation. However, the Board may only rule the County's action non-compliant if it is a clearly erroneous interpretation of the GMA itself, not solely because it differs from the Board's interpretation. Thus, the key issue is whether the GMA (not the Board) requires that the evaluation of whether lands meet the LTCS locational factors be an area-wide inquiry. As interpreted by Redmond I, it does not. As the County clearly explained in its Opening

[2] RCW 36.70A.030(10).
[3] City of Redmond v. CPSGMHB, 136 Wn.2d 38, 54-55, 959 P.2d 1091 (1998).

Brief, Redmond I supports the County's reading of the GMA that the LTCS inquiry is a parcel-specific inquiry. COB at 40-45.

As the County explained in its Opening Brief (COB at 15-16), the GMA definition of LTCS involves both an evaluation of the land's soils (growing capacity, productivity and soil composition) and locational factors (proximity to population areas and possibility of more intense uses of the land). RCW 36.70A.030(10). CTED has provided guidelines in WAC 365-190-050(1) to assist counties in evaluating those locational factors when designating agricultural resource lands. COB at 16-18. As the County later explained, this evaluation of the locational factors is a parcel-specific inquiry, focusing on the particular land in question. COB at 41-45. The County cited the Supreme Court's decision in Redmond I for the fact that the evaluation of the LTCS locational factors is a site-specific inquiry. Id.

In response, CTED argues that Redmond I holds that the "GMA requires an 'area-wide' process for designating and conserving agricultural lands." CTED Brief at 34. CTED fails to discuss the relevant passages from Redmond I (136 Wn.2d at 54-55) related to LTCS which the County cited (COB at 41). Instead, CTED relies on language taken out of context which appears earlier in Redmond I, saying that land use planning under the GMA is area-wide in scope, and is not driven by landowner intent. 136

Wn.2d at 52. However, when the Redmond I court later discussed the specific factors to consider in determining whether a particular piece of land meets the GMA definition of LTCS, it clarified that the LTCS analysis is a parcel-specific inquiry. The Court stated:

> Under the statutory definition of this second element (long-term commercial significance), the Board must evaluate growing capacity, productivity, and soil composition, proximity to population areas, and the possibility of more intense uses of the land in question before the area could be designated "agricultural land."

136 Wn.2d at 54 (footnote omitted) (emphasis added). The Court additionally pointed out that the factors in WAC 365-190-050(1) are to guide the local jurisdiction in determining if the "land" in question has long-term commercial significance for agricultural production. Id. at 55.[4]

Redmond I makes clear that the LTCS inquiry is a parcel-specific one. CTED pays lip service to the County's argument ("CTED agrees with Snohomish County that the designation and conservation of agricultural lands requires a review of the specific lands in question to determine whether they have long-term commercial significance." CTED Brief at

[4] Contrary to its actions in this case, the Board in another case correctly applied the LTCS inquiry on a parcel-specific analysis. In Orton Farms, LLC v. Pierce County, No. 04-2-0007c, Final Decision and Order (August 2, 2004), the Board followed Redmond I by ruling that the LTCS test is a parcel-specific one. It required that all five LTCS criteria be met for the property at issue, and rejected CTED's argument that the three soils-based criteria for the LTCS definition were more important than the LTCS locational factors. Id. at 24-26.

35), but then asserts, citing King County v. CPSGMHB 142 Wn.2d 543, 558, 14 P.3d 133 (2000) (King County), that the LTCS inquiry must be area-wide. CTED Brief at 35-36. King County says no such thing. The quoted language from King County relates, as did the language CTED cited from Redmond I (at 136 Wn.2d 52-53), to a county's general duty under the GMA to designate agricultural lands. It does not relate to LTCS, which is a parcel-specific inquiry. CTED's argument (at 35-36) that the LTCS inquiry should be an area-wide one is based on what it wishes the law were, not on what the law clearly is, as stated in Redmond I.

CTED's arguments are based upon (1) language from Redmond I which was used in a different context, unrelated to LTCS, and on (2) equally inapplicable language from King County. In short, CTED fails to engage the County's relevant legal authorities. Its argument that the test for LTCS is an area-wide inquiry is not supported by the authorities it cites. CTED is wrong.[5]

This point is critical. The Board erred in its interpretation of the GMA by stating that the test for LTCS is based upon "area-wide patterns of land use" (Order on Compliance at 18; CP Sub #24, p. 2903), rather than a parcel-specific one. As a result, its conclusion that the County's

[5] Neither Futurewise nor the District briefed this issue.

decision was clearly erroneous because it was not based on area-wide inquiry was legally flawed. That ruling was based on an erroneous interpretation of the GMA and requires reversal under RCW 34.05.570(3)(d).

B. The County's Decision Was Supported By the Record, and the Board Erred By Failing to Defer to that Decision.

1. The Board Was Not Permitted to Reject the County's Land Use Choice Simply Because There Was Evidence in the Record that Supported a Choice Which the Board Preferred.

In Subsection A.1 above, the County explained that the Board was required to defer to the County's decision as long as that decision was supported by the record and not based on a clearly erroneous interpretation of the GMA. The relevant inquiry, for the purposes of this appeal, is whether the Board's decision in finding that the County's decision to re-designate the Island Crossing lands was clearly erroneous, under RCW 36.70A.320(3) should be reversed.[6] The issue is not whether there was evidence in the record that might have supported a different decision. The issue is whether the Board improperly failed to defer to the County's decision, as it was required to do under Quadrant, warranting reversal by this court.

When a County takes a GMA action, and that action is appealed to

[6] The County will concentrate its arguments on the grounds that the Board's ruling erroneously interpreted or applied the law. RCW 34.05.570(3)(d).

the Board under RCW 36.70A.280, the Board's decision is to be made based upon the County's record in that case. RCW 36.70A.290(4). There is nothing in the GMA that prohibits a county from making a different decision from one it might have made earlier on a piece of property, as long as the new record supports the new decision. Similarly, there is nothing in the GMA that forbids a county from making a planning decision similar to one that the Board (or a reviewing court) earlier found to be noncompliant with the GMA if it believes the record now supports that decision.

Here, Lane's request to the County was based on RCW 36.70A.470(2), which allows citizens to propose comprehensive plan changes on an annual basis:

> Each county and city planning under RCW 36.70A.040 shall include in its development regulations a procedure for any interested person, including applicants, citizens. . . to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

This statute requires counties to consider plan amendment requests at least annually ("The suggested amendments shall be docketed and considered on at least an annual basis, ..."). Further, and particularly relevant to this appeal, there is nothing in the statute that prohibits a citizen from making an amendment request that is similar to one he made earlier which may

have been turned down. Nor is there anything in the GMA that imposes a different standard on the Board for reviewing (1) a county decision on an amendment request that might be the same as a request which was unsuccessful at an earlier date, or (2) a county decision that might be different from one it made on the same property at an earlier date. The County's decision is presumed valid, with the petitioner before the Board having the burden of proof and the Board having the authority to reverse the County only if the County's action is clearly erroneous. RCW 36.70A.320(1), (2) and (3).

Lane's request was to re-designate about 110 acres from agricultural and rural designation to urban use and put it in the Arlington UGA. Lane had made similar request in the late 1990s which had ultimately been unsuccessful. For the purpose of Board review, the fact that Lane had made a similar request years earlier that had been unsuccessful was irrelevant under the GMA. The only thing that mattered was whether the record in this case supported the County's decision such that it was not clearly erroneous. RCW 36.70A.290(4), .320(3).

Here, CTED asserts that Lane's request in designation should be reviewed under a "changed circumstances" test. Without citing any authority for its argument, CTED states:

. . . [I]f the present evidence shows no change in circumstances at

> Island Crossing since the prior litigation, there is no principled reason for the Board to reach a contrary result now.

CTED Brief at 30, footnote 20. However, this Court has ruled that "changed circumstances" is not the GMA test for Board review of a local planning action. Redmond II (City of Redmond v. CPSGMHB, 116 Wn.App. 48, 55-58, 65 P.3d 337, review denied, 150 Wn.2d 1007 (2003)). Similarly, Futurewise asserts that, "there have been no material changes in circumstances since these earlier rulings and the record developed by the County is substantially the same." Futurewise Response Brief at 3. Through these assertions, CTED and Futurewise claim that a county may not make a change in designation on a piece of property without proving a change in circumstances. The Board then imposed this non-GMA standard of review, ruling that there were "no changed circumstances that could support the County's revision of the 75.5 acres from agricultural resource lands to non-agricultural resource lands commercial uses." CP Sub #24, p. 2588 (emphasis added). This is simply a wrong statement of the standard of review under the GMA, and the Board's acquiescence in imposing this exalted standard on the County was based on an erroneous interpretation of the law requiring reversal. RCW 34.05.570(3)(d).

One of the key issues in this case is that a county may make a different planning decision from one it made several years earlier

regarding the same property, even without showing a change in circumstances, as long as that new decision is not clearly erroneous. The fact that the County may have made a different planning choice than one it made a few years earlier without a showing of changed circumstances does not mean that the new choice is clearly erroneous. In light of the GMA's mandate that the Board defer to a county's planning choice if it is supported by the record, the key issue is whether the record contained evidence supporting the County's decision. The Board's decision must be based on a review of the County's record (RCW 36.70A.290(4)), granting deference as required under RCW 36.70A.3201, and not be prejudiced by its view of what the appropriate outcome should be based on prior decisions related to the property.

The County will now reply to Futurewise's arguments that the record did not support the County's decision.

2. The Board Erred by Failing to Defer to the County's Decision to Re-Designate the Property.

In the County's Opening Brief, it discussed the ten locational factors for LTCS in WAC 365-190-050(1) and explained how the County's conclusions that the Island Crossing property did not have LTCS as agricultural land under the GMA was supported by the record. COB at 21-35. In response, Futurewise argues to the contrary, claiming that the

County Council's findings are inadequate to rebut the "analysis" in the Draft Supplemental Environmental Impact Statement (DSEIS), which reached contrary conclusions on every one of the ten factors. Futurewise Brief at 28-38. Futurewise faults the County Council for failing to make formal findings relating to some of the factors in WAC 365-190-050(1). Futurewise Brief at 35, 40. However, as its co-Respondent CTED correctly points out in its Brief, Futurewise's reliance on the Council's "findings" is misplaced; the key issue is whether the facts in the record, not the County's findings, support the County's decision:

> Deference to local policy decisions therefore requires a review of the record as a whole. The Board (and the reviewing Court) is not required to defer to the County Council's specific findings, ... RCW 36.70A.290(4) mandates that Board decisions be based on the record before the local government - not the findings of the local government . . . .

CTED Brief at 22 (emphasis in original). The County agrees. The fact that the County Council may not have made a formal finding related to a factual issue that was obvious or uncontested does not detract from the Council's decision.

Futurewise repeatedly touts the "mandate" to conserve designated agricultural lands first acknowledged in King County (142 Wn.2d at 562).

Response Brief at 4, 20, 21, 26-28, 35, 37, 40.[7] However, King County involved a situation where lands that clearly met the GMA definition of "agricultural lands" were proposed for a different use - a recreational use. In that instance, the Supreme Court said that under the GMA, agricultural uses trumped recreational uses and the lands could not be redesignated.

The case at bar is different. Here, the County contends that the Island Crossing lands no longer meet the GMA definition of "agricultural land" because they are not of LTCS as agricultural lands. There is nothing in the GMA that requires a county to freeze lands in an agricultural designation if they do not meet the GMA definition of "agricultural land." In fact, the Board itself has acknowledged that designation as agricultural land is not permanent, and that a county is not only authorized, but required, to continually review and evaluate its plans, including its resource lands designations. Orton Farms LLC v. Pierce County, No. 04-3-0007c, Final Decision and Order (August 2, 2004).[8] The County's

[7] Futurewise argues that the "agricultural conservation mandate" should control ("inform") a county's analysis of the CTED guidelines in WAC 365-190-050. Futurewise Brief at 26. Neither the guidelines, nor Redmond I, nor CTED itself in its Brief provide any authority to support such an argument, which would essentially trump a county's discretion to consider those guidelines as it deems appropriate and reach a reasoned decision. RCW 36.70A.3201.

[8] Although Orton Farms specifically cited the seven-year review and revise procedure in RCW 36.70A.130(1)(a) and (4), counties amend their plans and regulations regularly. RCW 36.70A.130(2)(a). The annual docketing procedure in RCW 36.70A.470(2) utilized here by Lane is another GMA mechanism to facilitate periodic review of plan designations.

redesignation of lands that no longer meet the GMA definition of "agricultural land" does not thwart King County's agricultural lands conservation mandate.

Futurewise continually trumpets the DSEIS's "analysis" of the LTCS locational guidelines in WAC 365-190-050(1) and faults the County for not following the DSEIS "analysis." See, e.g., Futurewise Brief at 25. However, as the County pointed out in its Opening Brief, the DSEIS contains very little "analysis" at all. The DSEIS sets forth some "facts" about the land, and then states its conclusions about whether those "facts" support a finding of LTCS. The County emphasizes again, as it did in its Opening Brief, that it has little disagreement with the DSEIS regarding the relevant facts related to the property. The County simply reached different conclusions. It is the County's conclusions that led it to make the choices it did. Thus, the key issue is whether the facts in the record (not the DSEIS's conclusions) support the County's planning choice. The issue is not whether those facts might have supported a different choice. Futurewise confuses this distinction in its Brief.

Futurewise claims that the County relied for its "result-oriented" decision on evidence in the record other than the analysis in the DSEIS. Futurewise Brief at 29. Although it is true that the County considered evidence that came into the record during the public hearing process after

the DSEIS was drafted, and that the DSEIS therefore did not consider, the County also considered the DSEIS itself. See, e.g., Amended Emergency Ordinance No. 04-057, pp. 7, 9, Findings Q, R and Z (Appendix D to CTED Brief). The County is not required to reach the same conclusions the DSEIS[9] reached when (1) it has more "facts" before it than did the drafters of the DSEIS, and (2) the "facts" in the DSEIS support the County's decision. In fact, it is Futurewise, in its continual reference to the "conservation mandate," that has a result-oriented bias in its discussion of the WAC guidelines. The County will now reply to Futurewise's arguments regarding the WAC factors.

1. Availability of Public Facilities. Futurewise fails to respond to the County's arguments (COB at 22) regarding the meaning of the word "available," and instead asserts that the County's conclusion that public facilities are available is simply based on its desire to see the area developed. Although it is true that RCW 36.70A.110(4) restricts the hook up of sewer to the subject property (since it is outside the Arlington UGA), if the property were included in the UGA as proposed, that would remove the restriction in .110(4). Sewer service could then be hooked up and serve the property. There would be no need to extend miles of sewer line

[9] The relevant language from the DSEIS discussing the WAC guidelines is located in the record at CP Sub #24, p. 2183.

because the sewer is already there. It is "available." This conclusion is not based on any result-oriented thinking. It is based on a statement of fact.

2. Tax Status. The DSEIS states that 32% of the parcels in the subject area are taxed for agricultural use. CP Sub #24, p. 2183. The County agrees. This means that 68% of the parcels (over 2/3) are taxed for a more intense use than agriculture. The County Council was clearly justified in concluding that this factor weighed in favor of a non-agricultural designation. Instead of acknowledging this simple mathematical reality, Futurewise instead claims that 32% is really "a fairly high percentage." Futurewise Brief at 31. The County must ask, "compared to what?" It certainly is not a high percentage compared to the number of parcels that are taxed for a more intense use, since it is less than half of that total (32% to 68%). Futurewise's spin on the facts cannot alter them. The fact that over two-thirds of the parcels are taxed for non-agricultural use supports the County's redesignation.

3. Availability of Public Services. In the County's Opening Brief, it pointed out that the DSEIS "analysis" was completely erroneous on this issue since it re-stated the "public facilities" analysis in the first section above, confusing "public facilities" with "public services. (COB at 23-24). Futurewise admits this error in the DSEIS (Futurewise Brief at 31-32), but then claims that the County's conclusion that there were adequate services

to serve the area (COB, Appendix A(3) thereto) is flawed because the County Council did not offer "evidence" on the point. However, there is no need to offer any "evidence" on a point that is uncontested. The record shows that the area is adequately served by fire protection, law enforcement, public health, education, recreation, environmental protection and other public services. CP 1884. See Lane and Arlington's Brief at 5. Futurewise has not pointed to any information in the record suggesting that the County's conclusion is wrong. Certainly, the "analysis" in the DSEIS does not mandate a different conclusion on this point since that "analysis" is erroneous, as admitted by Futurewise.

4. Relationship of Proximity to Urban Growth Area. Again, the County agrees with the facts, as stated in the DSEIS, that the property is adjacent to the Arlington UGA. Although Futurewise chides the County for not making any independent finding on this issue (Futurewise Brief at 33), there is nothing to add to the DSEIS: any additional finding would be superfluous on this uncontested point. Futurewise's discussion of other issues such as the location of the city limits (as opposed to the UGA), the presence of a flood plain, or that the proximity to the UGA was "gerry mandered" (sic) is irrelevant. Futurewise Brief at 32-33. The WAC factor is proximity to the UGA. The DSEIS by its clear language ("the southern tip of the proposed site is adjacent to the UGA." CP Sub #24, p. 2183)

supports the County's conclusion. As the Board itself noted, agricultural land that is adjacent to a UGA will be under pressure for alternative, urban uses. See COB at 25. Accordingly, such land does not have LTCS for agricultural use.

5. Predominant Parcel Size. On this factor, as stated in the DSEIS, the evidence is uncontroverted that of the eight parcels which comprise the subject property, three are larger than ten acres in size ("20.7 acres, 15.8 acres, 14.6 acres") and five are smaller than ten acres ("8.1 acres, 2.9 acres and three smaller parcels"). CP Sub #24, p. 2183; COB, Appendix A(5). The County Council characterizes these parcels as having "small parcel size," no doubt because the majority of the parcels (5 out of 8) were smaller than the County's minimum size for Agricultural zoning (ten acres). COB at 26. In contrast, with no explanation, the DSEIS concluded from these same facts that the "predominant parcel sizes are large." CP Sub #24, p. 2183; COB, Appendix A(5). The DSEIS does not explain what "large" is, or how many acres a parcel has to have to be considered "large." The County disputes such a conclusion, since less than half of the parcels meet its ten-acre minimum parcel size for agricultural zoning.

Futurewise argues that because the majority of the acreage in the subject property is in parcels that are over ten acres, the Board was justified in concluding that the predominant parcel size is large.

Futurewise Brief at 34. However, this argument is wrong for two reasons. First, it misreads the clear language of WAC 365-190-050(1)(d), which references predominant parcel size, not whether the majority of the acreage is in large parcels. The County Council considered the fact that five of the eight parcels were below the minimum size for agricultural designation and considered that this factor weighed in favor of a non-agricultural designation. Second, the issue is not whether the evidence can be interpreted in a way that supports the Board's decision. Rather, the issue is whether the Board improperly failed to defer to the County's interpretation of the GMA. Quadrant, 154 Wn.2d at 238. The term "predominant parcel size" is not defined in the WAC regulations. The County was therefore free to determine that because most of the parcels were smaller than the County's ten acre minimum parcel size for the A-10 agricultural zoning designation, that meant that the "predominant" parcel size was "small." This conclusion was supported by the record and was consistent with the GMA. The Board erroneously failed to defer to the County's decision.

6. Land Use Settlement Patterns and Their Compatibility With Agricultural Practices. The County addressed this criterion in its Opening Brief. COB at 27-28. The DSEIS "analysis" on this factor consists of one sentence ("Most of the proposed site is currently in farm use with

interspersed residential and farm buildings." CP Sub #24, p. 2183. COB, Appendix A(6) thereto.) The Council relied upon other information regarding development patterns in the area and the fact that there were "22 to 30 existing grandfathered legal lots in the proposed area that are not constrained by the current A-10 zoning and which can be developed at a density near urban density." Id. Futurewise does not dispute or respond to this point. Futurewise Brief at 34-35. Obviously, if those lots were developed at such density, that would be inconsistent with agricultural use. The County is not required to close its eyes to the development potential of land when making its land use decisions. Quadrant, 154 Wn.2d at 239-240 [County was justified in interpreting the term "growth" in RCW 36.70A.110 as including not only the built environment but also the growth potential (vested applications and development rights) for the land at issue]. The County's conclusion that this current development potential of the subject property was inconsistent with LTCS as agricultural land was supported by the record. The Board erred by not deferring to the County's choice to remove it from agricultural designation.

7. Intensity of Nearby Land Uses. The County addressed this issue in its Opening Brief (COB at 28-29).

8. History of Land Development Permits Issued Nearby. The County addressed this issue in its Opening Brief (COB at 29-30).

9. Land Values Under Alternative Uses. In the County's Opening Brief (COB at 30), it explained that even the Board acknowledged in an earlier case involving this same property that the Island Crossing land had potential for substantial economic value under alternative uses. Sky Valley, et al. v. Snohomish County, No. 95-3-0068c, Order on Compliance (Court Remand Portion of case) (April 22, 1999). Futurewise does not dispute this citation or legal principle. Instead, it accuses the County of ignoring GMA's agricultural conservation mandate and the land's value as agricultural land. It points to language in Redmond I saying that land should not be designated based on economic value. Brief at 38.

However, Futurewise misreads Redmond I. Economic value of land is not the only factor the County is considering. It is only one of ten factors to consider, and it is a factor the County is statutorily required to consider. RCW 36.70A.170(2) (requiring counties to consider CTED guidelines, including those in WAC 365-190-050). Redmond I told counties that they should be guided by CTED's locational factors in WAC 365-190-050(1). 136 Wn.2d at 55. By considering land values under alternative uses, which is the locational guideline in WAC 365-190-050(1)(i), the County is following Redmond I, not violating it. The County's conclusion that this factor militates in favor of redesignating the land out of agricultural use was not clearly erroneous.

10. Proximity to Markets. The County addressed this issue in its Opening Brief. COB at 31. Futurewise has added nothing new to this discussion.

The County explained in its Opening Brief that on well over half the factors, the record supported the County's conclusions that the lands did not have LTCS for agricultural designation. COB at 31-35. The above discussion replying to Futurewise's arguments confirms that conclusion.

Futurewise continually refers to the "evidence" supporting the DSEIS as being superior to that supporting the County's conclusions. See, e.g., Brief at 39. The County repeats that the evidence is the same. It has not changed. Only rarely, if at all, has the County disputed the factual contents of the DSEIS. The problem with the DSEIS is not the factual evidence, but the legal conclusions it reaches regarding the ten criteria in WAC 365-190-050(1) based on that evidence. The record supports the County's conclusion that, in light of its consideration of all ten WAC factors, the land does not have LTCS for agricultural production. CTED argues that the County's analysis rested "overwhelmingly and improperly on individual landowner intent. . . ." CTED Brief at 36-37. The County's lengthy discussion of the WAC factors above and in its Opening Brief (1t

18-33) demonstrates that this charge is not true.[10]

Futurewise chides the County repeatedly for not making findings on several key issues. However, the County made specific findings on seven of the ten factors (COB, Appendices A(1) through A(10)). Two of the factors on which it made no findings (Criterion 4-Proximity to UGAs and Criterion 10-Proximity to Markets) are similar to each other, and the analysis is so obvious, since the land is adjacent to the Arlington UGA, as to not require any additional formal findings. Moreover, as discussed earlier, the key issue is not whether the County made specific findings on each of the ten criteria, but whether there was evidence in the record to support the County's decision. As discussed above, there was. In many cases, the DSEIS itself contained that evidence even though its conclusions frequently differed from the County's.

C. The Board Is Not a Fact-Finding Body; Its Interpretation of the Record is Not Entitled to Deference By the Court.

Futurewise argues (Brief at 41) that under the APA "the Board is the finder of fact," citing Wells v. WWGMHB, 100 Wn.App 657, 674, 997 P.2d 405 (2000). However, this language from Wells is dicta relating to the narrow issue of whether the appellants in that case had adequately established standing to appeal to the Board. Id. Wells does not authorize,

[10] Redmond I allows the County to consider landowner intent. 136 Wn.2d at 53. However, it may not be the controlling factor in the County's decision.

let alone require, the court to defer to the Board's factual findings to the extent those findings were a basis for its decision on the merits of the case.

Allowing the Board to be "the finder of fact" impermissibly gives discretion to the Board in interpreting whether the County's planning choice is in compliance with the GMA. The Supreme Court in Quadrant squarely rejected this notion, holding that, "[T]he GMA contains numerous provisions which tend to show that local jurisdictions have broad discretion in adopting the requirements of the GMA to local realities." 154 Wn.2d at 236. In that light, the Court should defer to the County Council's interpretation of the factual record developed at the local level. It is the County, not the Board, that heard the testimony of citizens and weighed local circumstances in deciding how the Island Crossing property should be designated, as required by RCW 36.70A.3201. Quadrant at 238. Instead, the Board is an appellate body that bases its decision on the record established through public hearings at the local level. RCW 36.70A.290(4).

CTED contends (Brief at 31) that RCW 36.70A.290(4) gives the Board the authority to weigh the evidence and decide whether it supports the County's decision. This argument is contrary to the standard of review the Board is to apply to a County decision, which is to defer to that decision as long as it is not consistent with the goals and requirements of

the GMA. Quadrant, 154 Wn.2d at 238. It is inconsistent with that standard of deference to allow the Board to decide what evidence it deems "more" important or credible. Allowing the Board to re-weigh the evidence simply gives a green light to the Board to second-guess the County, which is exactly what Quadrant said is not allowed.

D. The Trial Court's Rulings on Res Judicata Were Erroneous.

In the County's Opening Brief, it argued that if the District wished to raise the issue of administrative res judicata to bar the County's redesignation of the Island Crossing property into the Arlington UGA, it was required to raise that issue before the Board and it failed to do so. COB at 45-47.[11] The trial court erred first by excusing the District from raising the res judicata issue before the Board because the Board would not have ruled on it. The trial court again erred by ruling that although res judicata does not apply to a county's legislative decisions, it applies to the judicial review of them. (CP Sub #65, pp. 31-32) such that the County must show a change in circumstances justifying the change in designation. Requiring a "change of circumstances" is an erroneous standard of review under the GMA.

[11] Although the District contends that it raised the res judicata issue before the Board (District Brief at 13), it is uncontroverted that it did so only in its Reply Brief. CP Sub #57, p. 84. A party may not raise an issue for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

In a quasi-judicial proceedings, res judicata clearly applies to administrative agencies. Seattle Area Plumbers, Housing Plumbers, Pipefitters, Refrigeration and Marine Pipefitters Apprenticeship Committee v. Washington State Apprenticeship and Training Council, 131 Wn.App. 862, 877, 129 P.3d 838 (2006). In Washington, both the Shorelines Hearings Board[12] and Pollution Control Hearings Board[13] have applied res judicata to proceedings before them. However, the Board has done an end run around this rule of law by illegally deciding that res judicata does not apply to proceedings before it.[14] The trial court's ruling in this case sanctions the Board's unlawful interpretation of the law by excusing the District's (and Futurewise's) failure to raise the res judicata issue before the Board and allowing it to raise the issue for the first time in superior court. Under the trial court's ruling, no litigant will ever be required to raise res judicata before the Board since the issue can be raised for the first time in superior court with impunity, and the Board will continue to refuse to apply res judicata principles to proceedings before it. That is an untenable Catch-22. This court should, on procedural grounds,

---

[12] Kessler, et al. v. Pierce County, et al., SHB No. 99-010, Findings of Fact, Conclusions of Law and Order (August 26, 1999) CP Sub #62 (Exhibit A thereto).

[13] Inland Foundry Co., Inc. v. Spokane County Air Pollution Authority, PCHB No. 94-154, Order Granting Summary Judgment (March 20, 1995) CP Sub #62 (Exhibit C thereto).

[14] See, e.g., Hensley v. Snohomish County, No. 03-3-0010, Order on Motions (August 11, 2003).

reverse the trial court's ruling on res judicata because the District failed to raise the issue in a timely manner before the Board.

The trial court additionally erred by ruling that the doctrine of res judicata barred Snohomish County from redesignating the Island Crossing property into the Arlington UGA. A similar action in 1996 had been overturned in court, resulting in the County's 1998 action placing the land back in an agricultural designation. The trial court ruled that, absent a showing of changed circumstances, the County could not make a different choice now and place the land into the UGA. CP Sub #69, p.24. The County explained in its Opening Brief that this "changed circumstances" standard violated GMA and this Court's decision in Redmond II, 116 Wn.App. at 55. COB at 47-48.

In response, the District defends the trial court's ruling, contending that the County is required to show not only that there has been changes in circumstances but that such changes "resolve the reasons that the prior application was rejected." District Brief at 22. In support of its argument, the District cites a case involving a local permitting, quasi-judicial issue, DeTray v. City of Olympia, 121 Wn.App. 777, 788, 90 P.3d 1116 (2004). DeTray is not on point. It involved review of a quasi-judicial permit decision. This case involves review of a legislative decision.

The trial court's imposition of this "change in circumstances"

standard imposes a heightened burden of proof on local decisionmakers that nowhere appears in the GMA. Instead of placing the burden of proof on a petitioner to show that the County's land designation choice is clearly erroneous as the GMA requires (RCW 36.70A.320(2) and (3)), the trial court erroneously placed the burden of proof on the County to show there had been a change in circumstances since the late 1990's justifying the County's new land use choice for the Island Crossing area.

This ruling is contrary to GMA's direction that local decisionmakers be granted deference in their land use choices, based on local circumstances. RCW 36.70A.3201. It is contrary to the deference that the Board must show towards local planning decisions under the GMA. Quadrant Corporation v. CPSGMHB, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) (See COB at 9-10). This ruling ignores the fact that the GMA requires counties to consider amendments to their plans on an annual basis. RCW 36.70A.470(2). That GMA requirement contains no prohibition on a county considering different choices for the same property than it may have made earlier. Id.

The District's argument (District Brief at 29) that a party who unsuccessfully appeals an adverse county decision on a plan amendment request must be "bound" by the GMA decisions is, of course, refuted by RCW 36.70A.470(2), which allows an unsuccessful applicant to request a

similar comprehensive plan change more than once, and to have such request be considered on the basis of the new record established in the new case. RCW 36.70A.290(4). ("The board shall base its decision on the record developed by the . . . county . . . ."). The District's further argument (District Brief at 29) that an applicant who unsuccessfully appeals an adverse decision on his application for a re-designation on his property must show "materially changed circumstances" while a disappointed applicant who does not appeal need not show changed circumstances upon reapplication lacks any legal authority whatsoever. The relevant legal standard is the "clearly erroneous" one in RCW 36.70A.320(3), not the District's "materially changed circumstances" one, which was plucked from thin air.

All of these authorities stand for the proposition that a county may make a different land use choice on certain property than one it made earlier as long as the "record" supports that other choice. That is exactly why the County has discretion to make choices under the GMA (RCW 36.70A.3201) and why its hands may not be tied by an unlawfully restrictive requirement to show a "change in circumstances" before it may make a different GMA choice.

As the County has demonstrated, the record supports its decision to redesignate the Island Crossing property out of an agricultural designation.

COB at 18-35; Section B.2 supra at 13-23. Although the record may also have supported a different choice, the choice was the County's to make, free of having to show any "change in circumstances." As long as the record supported the County's choice, the Board and the trial court should have affirmed that choice.

The trial court erroneously imposed a change of circumstances standard of review on the County's actions warranting reversal of its decision.

III CONCLUSION

Based upon the foregoing arguments and authorities, Snohomish County requests that the court reverse the Board's and the trial court's decisions. The County requests that the Court enter an order finding the County's re-designation of the property out of agricultural lands to be compliant with the GMA.[15]

RESPECTFULLY SUBMITTED this 5th day of June, 2006.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

John R. Moffat, WSBA #5887
Sr. Deputy Prosecuting Attorney
Attorney for Snohomish County

[15] CTED claims that the Court lacks authority to find the County's actions compliant with the GMA. CTED Brief at 10. However, the Supreme Court in Quadrant made just such a ruling. 154 Wn.2d at 247-48. The APA specifically authorizes a reviewing court to order an agency to take action as required by law. RCW 34.05.574(1). Here, such action is to find the County in compliance with the GMA.